90-1796

No. 90-

Supreme Court, U.S.
FILED
MAY 21 1991
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1990

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, LOCAL UNION NO. 1937,

Petitioner,

v.

THE LOWER LAKE DOCK COMPANY, NORFOLK SOUTHERN CORPORATION, NORFOLK & WESTERN RAILWAY COMPANY and LAMBERT'S POINT DOCK COMPANY,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

HAROLD A. ROSS
(Counsel of Record)
ROSS & KRAUSHAAR CO., L.P.A.
1548 Standard Building
1370 Ontario Street
Cleveland, Ohio 44113
(216) 861-1313

Attorney for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

56

QUESTIONS PRESENTED

1. Whether the Court of Appeals failed to give proper deference to the trial court's entry of a preliminary injunction prohibiting several railroads from violating the good faith duty imposed by Section 2 First of the Railway Labor Act, 45 U.S.C. § 152 First, to make and maintain collective bargaining agreements, by reversing the grant thereof on the ground that the district court had entered erroneous findings of fact that the joint labor relations activities of the railroad constituted them as joint employers or alter egos?

2. Whether a rail carrier, which is terminated as the operator of a dock by another rail carrier while in the midst of collective bargaining negotiations, and the owning rail carrier, which is involved in and, by reason of a cost plus contract between them, concerned with the bargaining agreement and the ongoing negotiations, are under an obligation to continue bargaining with the dock employees' collective bargaining representative and to delay implementation of the termination until the "major disputes" procedures of the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.*, have been exhausted?

LIST OF PARTIES
PURSUANT TO RULE 29.1

All parties are listed in the caption.

1. Petitioner is not a corporation.

2. Respondent, The Lower Lake Dock Company, is a corporation, which is a wholly-owned subsidiary of the M. A. Hanna Company.

3. Respondent Norfolk Southern Corporation is the parent of respondent Norfolk and Western Railway Company. Lambert's Point Docks, Inc., is a wholly-owned subsidiary of Virginia Holding Corporation, which is a wholly-owned subsidiary of Norfolk Southern Properties, Inc., which in turn is a wholly-owned subsidiary of Norfolk Southern Corporation.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 2

STATUTES INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 11

I. THIS CASE IS AN APPROPRIATE VEHICLE TO DETERMINE THE COLLECTIVE BARGAINING DUTIES OF RAIL CARRIERS ARISING OUT OF THE TERMINATION OF AN OPERATING AGENCY AGREEMENT IN THE MIDST OF NEGOTIATIONS, BECAUSE THE LESSOR RAILROAD WAS DISSATISFIED WITH THE UNION'S POSITION ON CONCESSIONARY ISSUES AND DECIDED TO REPLACE THE LESSEE OPERATOR WITH A NEWLY CREATED NONUNION SUBSIDIARY 13

II. THE REVERSAL OF THE GRANT OF THE PRELIMINARY INJUNCTION BY FAILING TO GIVE DEFERENCE TO THE TRIAL COURT'S FINDINGS CONFLICTS WITH THE DECISIONS OF THIS COURT AND VARIOUS COURTS OF APPEALS 17

CONCLUSION 22

TABLE OF CONTENTS – Continued

Page

APPENDICIES:

APPENDIX A

Court of Appeals Opinion Entered on March 12, 1991 ..... 1a

APPENDIX B

December 29, 1989 Bench Opinion of District Court, Order of Preliminary Injunction and Memorandum and Order Filed on January 2, 1990 ..... 11a

APPENDIX C

Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc Filed on April 24, 1991 ..... 21a

APPENDIX D

Statutes Involved 23a

TABLE OF AUTHORITIES

Page

CASES:

A Quaker Action Group v. Hickel, 421 F.2d 1111 (D.C. Cir. 1969) 18

Anderson v. City of Bessemer City, North Carolina, 470 U.S. 564 (1985) 18, 19

Boire v. Greyhound Corp., 376 U.S. 473 (1964) 21

Burlington Northern R.R. Co. v. United Transportation Union, 862 F.2d 1266 (7th Cir. 1988) 16

Chicago & North Western Ry. Co. v. Railway Labor Executives' Ass'n, 908 F.2d 144 (7th Cir. 1990), *cert. denied*, 112 L.Ed.2d 1179 (1991) 14

Detroit & Toledo Shore Line R.R. Co. v. United Transportation Union, 396 U.S. 142 (1969) 12, 15, 16

Fibreboard Paper Products Corp. v. NLRB, 377 U.S. 703 (1964) 15

First National Maintenance Corp. v. NLRB, 452 U.S. 666 (1983) 13, 15

Gibbs v. Norfolk Southern Ry. Co., 474 F.2d 1341 (4th Cir. 1973) 19

Inwood Laboratories v. Ives Laboratories, 456 U.S. 844 (1982) 20

Metropolitan Detroit Bricklayers District Council v. J. E. Hoetzer & Co., 672 F.2d 580 (6th Cir. 1982) 21

Order of Railroad Telegraphers v. Chicago & North Western R.R. Co., 362 U.S. 330 (1960) 15

Parklane Hosiery Co., Inc., 203 NLRB 597 (1973) 21

TABLE OF AUTHORITIES – Continued

Page

Pittsburgh & Lake Erie R.R. Co. v. Railway Labor Executives' Ass'n, 491 U.S. 490 (1983)..... *passim*

Pulitzer Publishing Co. v. NLRB, 618 F.2d 1275 (8th Cir. 1979) 21

Railway Labor Executives' Ass'n v. Chicago & North Western Transportation Co., 890 F.2d 1027 (8th Cir. 1989), *cert. denied*, 111 L.Ed.2d 748 (1990)..... 14

St. Louis Typographical Union No. 8 v. Herald Co., 402 F.2d 553 (8th Cir. 1968)..... 19

Steele v. Louisville & Nashville R.R. Co., 323 U.S. 192 (1944) 20

Synanon Foundation, Inc. v. California, 444 U.S. 1307 (1979) 18

Textile Workers v. Darlington Mfg. Co., 380 U.S. 268 (1965) 13

Virginian Ry. Co. v. System Federation No. 40, 300 U.S. 515 (1937) 20

Zepeda v. United States Immigration & Naturalization Service, 752 F.2d 719 (9th Cir. 1983)..... 18

STATUTES:

National Labor Relations Act, 29 U.S.C. §§ 151 *et seq*.....14, 20

Railway Labor Act, 45 U.S.C. §§ 151 *et seq*. 3

Section 2, 45 U.S.C. § 152..... 12

Section 2 First, 45 U.S.C. § 152 First 2, 16

TABLE OF AUTHORITIES – Continued

Page

Section 2 Second, 45 U.S.C. § 152 Second 2

Section 2 Seventh, 45 U.S.C. § 152 Seventh..... 2

Section 2 Ninth, 45 U.S.C. § 152 Ninth.....2, 20

Section 6, U.S.C. § 156..... 2, 5, 14

OTHER:

Fed. R. Civ. P. 52(a) 18, 19, 20

No. 90-

In The

Supreme Court of the United States

October Term, 1990

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, LOCAL UNION NO. 1937,

Petitioner,

v.

THE LOWER LAKE DOCK COMPANY, NORFOLK SOUTHERN CORPORATION, NORFOLK & WESTERN RAILWAY COMPANY and LAMBERT'S POINT DOCK COMPANY,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner, International Longshoremen's Association, AFL-CIO, Local Union No. 1937, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this case on March 12, 1991.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 927 F.2d 900 and is

reproduced in the Appendix at App. A at 1a to 10a. The opinion of the United States District Court for the Northern District of Ohio is unreported. The trial court's bench opinion on December 29, 1989, the order of preliminary injunction entered on the same date and the district court's memorandum and order entered on January 2, 1990 are set forth in Appendix B at 11a to 20a.

JURISDICTION

The judgment of the Court of Appeals was entered on March 12, 1991. A timely petition for rehearing and suggestion for rehearing en banc was denied on April 24, 1991 (App. C, 21a).

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

The statutes primarily involved are Sections 2 First, 2 Second, 2 Seventh, 2 Ninth and 6 of the Railway Labor Act, 45 U.S.C. §§152 First, 152 Seventh, 152 Ninth, and 156, and are reproduced in Appendix D, at 23a-26a.

STATEMENT OF THE CASE

The Court of Appeals, engaging in a de novo review of the district court's findings, ruled that the district court's finding that the railroad lessor, the Norfolk and Western Railroad ("N&W"), and the operating lessee of

its dock, The Lower Lake Dock Company ("Lower Lake"), were joint employers was clearly erroneous. (App. A, 8a-9a). On this basis, the court below refused to give deference to the trial court's issuance of a preliminary injunction to prevent violations of the Railway Labor Act ("RLA"), 45 U.S.C. §§151 *et seq.*, including the duty to make and maintain agreements contained in Section 2 First of the RLA. (*Id.*). In addition, the Court of Appeals reversed the grant of the preliminary injunction against respondent Lower Lake Dock, admittedly the direct employer of the petitioner union's members, even though the district court entered findings that the dispute was a "major" one as to which the carriers had violated the duty to bargain in good faith. (App. A, 10a). The opinion indicates that the court below believed that this Court's decision in *Pittsburgh & Lake Erie R.R. Co. v. Railway Labor Executives Ass'n*, 491 U.S. 490 (1989), removed any basis for the conclusion that the dispute between Lower Lake Dock and the petitioner, International Longshoremen's Association, AFL-CIO, Local Union No. 1937 ("Union"), was a major dispute.

The Longshoremen's Union had long been the collective bargaining representative under the RLA for the longshoremen working at the Sandusky, Ohio coal dock which had been operated by Lower Lake since 1966 for N&W, a wholly-owned subsidiary of Norfolk Southern Corporation, and prior to that for the Pennsylvania Railroad.[1]

---

[1] After having completed work on the afternoon of March 12, 1991, the date on which the opinion of the Court of Appeals

(Continued on following page)

Since N&W's acquisition of the dock, Lower Lake had a contract with N&W to operate the dock and at the same time had a collective bargaining agreement with the Longshoremen's Union. N&W employed Lower Lake to operate the Sandusky dock on a cost-plus basis – labor costs and taxes being the principal cost components. It, therefore, had good reason to be and was intimately involved in both day-to-day operations and the long range collective bargaining that set the terms and conditions of employment and, as a result, the labor costs at the dock. (App. B, 18a).

N&W's involvement in the operation of the dock took several forms. As the testimony at the hearing before the trial court adduced, N&W yardmasters directed the members of the Longshoremen's Union as to their daily job duties. N&W supervisors gave orders and directions to the Lower Lake employees as to rerailing cars, handling safety matters, performing emergency repairs, and breaking in new employees. N&W controlled the flow of dock work and determined manning schedules, overtime and holiday operations. This was succinctly stated in correspondence dated November 8, 1989, between Lower Lake and N&W, in which Lower Lake carped on the fact that N&W "dictated manpower requirements, manning schedules, work rules, etc. for the past five years" at the

---

(Continued from previous page)

was published, the crew was notified about dinner time not to return to work. On the following day, operations were taken over by supervisors of Sandusky Dock, a subsidiary of N&W, and some longshoremen employed by C.T. Stevedoring Company, a nonunion operator. The supervisors had been employed by Lower Lake; the longshoremen had not.

Sandusky Dock. (App. B, 11a, 18a). The trial court relied upon this evidence. The Court of Appeals did not even refer to the document.

And petitioner's claim of bad faith bargaining against Lower Lake and the NS respondents reached back to 1984 at which time N&W began, what petitioner perceived and the trial court found, a campaign to interject itself directly into the collective bargaining process at the Sandusky coal dock. (*Id.*).

In 1984-1985, N&W carried out a time study of the dock operation to determine whether it could be operated with less personnel than was the case under the collective bargaining agreement between the Longshoremen's Union and Lower Lake. N&W performed the study itself and concluded that ten of the forty-seven full-time positions could be eliminated. This reduction in numbers or its equivalency in dollars became the pervasive concern of the labor negotiations thereafter. Lower Lake was unable to obtain the elimination of the ten jobs for N&W in the 1986 negotiations or in the subsequent application of that agreement.

In June 1988, the Longshoreman's Union served a Notice under Section 6 of the RLA, 45 U.S.C. §156, to initiate negotiations for changes in the collective bargaining agreement, including insertion of a successorship clause. Following the service of the notice, Petitioner was informed that N&W was putting the dock operation out for competitive bid. This notification by Lower Lake to the Longshoremen's Union came about when N&W informed Lower Lake that it was considering termination and noted, *inter alia*, that it "was greatly disappointed by

the adverse awards by Public Law Board No. 4327." (App. B, 18a).[2] N&W, however, later extended Lower Lake's operating contract through 1989.

During the course of the negotiations between Lower Lake and petitioner, N&W was kept apprised of their status and Lower Lake discussed and sought N&W's advice as to some matters.

In November 1988, the Longshoremen's Union and Lower Lake reached a handshake understanding to settle the new contract in a manner satisfactory to Lower Lake, and N&W as well. The testimony at the hearing on preliminary injunction established that Lower Lake believed it had N&W's assurance that the labor contract was satisfactory. In the tentative settlement, petitioner gave away seven jobs and other significant cost concessions, such as elimination of guaranteed Saturdays and the freezing or elimination of cost of living pay adjustments.

As a result of the dispute between the Longshoremen's Union and Lower Lake as to the meaning of the settlement in 1986, the Union's members refused to conduct a ratification vote until the terms of the handshake agreement were placed in writing.

Lower Lake refused to place the November 1988 understanding in writing and demanded the Union vote upon it. The settlement was voted down in December 1988. In January 1989, Lower Lake demanded the Union

---

[2] Those awards treated with the manning reductions sought by N&W under the terms of the 1986 bargaining agreement as finally codified, following a prior suit in the district court.

take the oral agreement back for a new ratification vote of the members. The Union was given until February 1, 1989 to approve the agreement. The Union was in the process of preparing a written document with the assistance of the Lower Lake's superintendent in order to present a written settlement to its members, when Lower Lake arbitrarily said any approval was too late.

On February 8, 1989, the Union invoked the mediation services of the National Mediation Board. Several meetings were held with the government mediator present. Throughout these meetings, Lower Lake insisted the Union accept the crew size and working conditions N&W was demanding or else Lower Lake would be terminated as the operator of the dock. Though the Union had agreed in the previous fall to the crew reductions and other major savings then agreeable to Lower Lake and N&W as a final settlement, the demands upon the Union's members were increased. On August 21, 1989, the Union was told that N&W was insisting upon a reduction of $750,000 in labor costs for continuance of the operation. Retroactive pay, which had been part of the tentative package, was taken off the table. At the insistence of N&W, Lower Lake sought to take back what had been previously agreed upon. The Union did not increase its demands, and on September 16, 1989, was given a list of items which it would give up so that the cost savings could be assessed.

Soon thereafter, N&W announced it was terminating Lower Lake, effective December 31, 1989, though it had earlier promised Lower Lake that it would await a further bid on the dock operation. (App. A, 3a). N&W awarded

the management of the dock to Sandusky Dock Corporation, a nonoperational subsidiary of respondent Lambert's Point Dock, Inc., specifically created for this role.[3] The labor at the dock was to be furnished by an outside company, CT Stevedoring, Inc. The dock management employees were offered jobs directly with Sandusky Dock with out those jobs being offered to outsiders. CT Stevedoring, however, placed public advertisements to fill the labor jobs. (App. B, 11a).

On December 19, 1989, the Union filed a complaint challenging the transfer on the basis that the respondents, particularly Lower Lake and N&W, had jointly engaged in a course of conduct violating the statutory commands of the RLA, including conduct starting as early as 1984, which culminated in a breach of their duty to bargain in good faith with the Union. Among other things, the complaint claimed that "defendant N&W engaged in certain unilateral activities at the Sandusky Dock and joined defendant Lower Lake in actions having as their purpose the circumvention of existing contractual obligations and in general to avoid the duty to maintain existing agreements, and further to interfere with and coerce [members] of the plaintiff Union in the exercise of their rights under Sections 1, First and 2 of the RLA, 45 U.S.C. §§151, First and 152." (App. A, 4a-5a).

---

[3] As testified at the hearing, the officers of Lambert's Point Dock both prepared the bid of newly created Sandusky Dock and also reviewed the bids of three other companies. The bidding and award process was a subterfuge to give the transfer process an air of independent judgment and credibility.

Hearing on the Union's motion for a preliminary injunction was held on December 29, 1989. From the testimony presented, it appeared to the trial court that the railroad had daily involvement with directing the Union's members and, moreover, there was direct testimony that N&W had control over the operations of Lower Lake at the dock and a letter establishing that N&W had "dictated manpower requirements, manning schedules, work rules, etc. for the past five years." (App. B, 11a, 18a). After hearing extensive testimony and oral argument, the district court, based upon the testimony and exhibits before it, issued a preliminary injunction preserving the status quo at the dock until the good faith bargaining requirements of the RLA had been satisfied through the negotiations and mediatory processes required by Section 6. In order to protect the bargaining required by the RLA, the court also prohibited the transfer of the management of the dock during that process.

In handing down its late hour decision, the lower court orally entered findings of facts and conclusions of law, and found, *inter alia*, that N&W owned all of the facilities involved, paid all management fees and expenses, and was not only kept apprised of all labor matters and negotiations, but also controlled the collective bargaining process since there could be "no acceptable agreement [] without the approval of the Railroad." (App. B, 11a). In finding that "the supervisory right [of N&W] in the collective bargaining [negotiations] is a bad faith element," the trial court concluded that Lower Lake Dock and Lambert's Point Docks were doing the dirty work of N&W and stood in its stead. (*Id.*).

On January 2, 1990, the district court supplemented its prior findings and conclusions in a written memorandum and order. (App. B, 16a-20a). Elaborating upon its bench opinion, the trial court noted that "the Railway Labor Act has a special purpose" with special remedial procedures which 'favor[] retaining the status quo until the rights of the parties can be fairly and fully investigated." (*Id.*, 17a). The court summarized the evidence presented, stating: "The Court, on the evidence submitted, *finds this to be a major dispute.*" (*Id.*, 18a). (Emphasis supplied). The lower court then went onto conclude:

> "Norfolk & Western is not, on the facts submitted, selling its facility but avoiding the necessity of union negotiations. On the evidence submitted, the Court finds a substantial likelihood of success on the merits." (*Id.*, 19a).

On March 12, 1991, the Court of Appeals reversed the order of preliminary injunction and remanded the cause to the district court. (App. A, 10a). Insofar as the NS respondents were concerned, the panel found that "there are insufficient facts to support the trial court's finding of alter ego or joint employer basis." (*Id.*, 7a). In reaching this conclusion, the Court asserted that the lower court had only listed certain "general findings to support its conclusion that N&W was an employer" and "did not tailor its findings" to the four factors involved in the analysis needed. to determine whether two companies are "joint employers." (*Id.*, 8a). Further, the Court stated that in regard to labor relations, "the district court stated only that N&W was 'fully advised,' 'made recommendations,' and 'had input,' " and failed to state for the record that "N&W controlled labor relations" and did not find that "N&W had immediate supervision or control of the

employees." (*Id.*). On this basis alone, the Court held that "the court's decision on joint employer status was clearly erroneous, there can be no likelihood of success against the railroad defendants, and plaintiff has not suffered the irreparable harm referred to by the district court." (*Id.*, 9a).

Since the NS and its subsidiaries were not found by the court below to directly be the employers of the Union's members, the decision concludes that they were not subject to the injunctive relief sought. The court also was unaware of any basis remaining upon which Lambart's Point is subject to injunctive relief. As to Lower Lake, citing the *Pittsburgh & Lake Erie* decision of this Court, the Sixth Circuit was uncertain as to whether the Union "retains an interest in requiring Lower Lake to maintain the CBA and comply with the dispute resolution procedures of the RLA." (*Id.*, 10a).

REASONS FOR GRANTING THE WRIT

This case is an appropriate vehicle to review and decide two major issues that have been plaguing railroad labor relations for years: Whether the joint employer or alter ego doctrine is applicable to employers governed by the Railway Labor Act, and whether the major dispute doctrine of the Railway Labor Act has any continued vitality?

In addition, in setting aside the preliminary injunction issued in the district court, the Court of Appeals conducted a de novo review of the trial court's factual findings and failed to give those findings deference. The

action of the appellate court is in conflict with the decisions of this Court and with the decisions of other courts of appeals.

The ramifications of the decision below are far-reaching. The decision cuts to the heart of the Railway Labor Act – its collective bargaining provisions. Review of that decision would permit this Court to determine the fundamental relationships between railroad employees and their employers under the RLA. If a rail carrier can use another carrier subject to the Railway Labor Act for decades, during which time it has significant control of the labor relations of the latter carrier and dictates the terms and conditions of employment, can terminate that relationship at will and, through a newly created, wholly-owned subsidiary, can bring in nonunion workers to replace the rank-and-file employees (not supervisors, however), then the basic principles of the Act set forth in the preamble to Section 2, 45 U.S.C. §152, no longer have any meaning and serve no purpose.

This case, therefore, would permit the Court to study the implications of its decisions in *Detroit & Toledo Shore Line R.R. Co. v. United Transportation Union*, 396 U.S. 142 (1969) and *Pittsburgh & Lake Erie R.R. Co. v. Railway Labor Executives Ass'n*, 491 U.S. 490 (1989), in a situation where the employer is not liquidating all or a portion of its business.

I. THIS CASE IS AN APPROPRIATE VEHICLE TO DETERMINE THE COLLECTIVE BARGAINING DUTIES OF RAIL CARRIERS ARISING OUT OF THE TERMINATION OF AN OPERATING AGENCY AGREEMENT IN THE MIDST OF NEGOTIATIONS, BECAUSE THE LESSOR RAILROAD WAS DISSATISFIED WITH THE UNION'S POSITION ON CONCESSIONARY ISSUES AND DECIDED TO REPLACE THE LESSEE OPERATOR WITH A NEWLY CREATED NONUNION SUBSIDIARY.

The Court should grant certiorari in order to resolve the ambiguities and conflicts arising out of various opinions relating to the managerial prerogatives of rail carriers. This case is well-suited to settle that issue and the limitations imposed upon railroads under the RLA in the exercise of such prerogatives.

In *Textile Workers v. Darlington Mfg. Co.*, 380 U.S. 268 (1965), this Court found "an employer has the absolute right to terminate his entire business for any reason he pleases." This would include ceasing business and refusing to bargain about it, even if the employer acted from an antiunion animus. *Id.*, 267 n.5. The concept that management must have unbridled ability to make certain essential decisions needed to manage its business was further extended by the Court to an employer's decision to close down a portion of its business. *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981). In the latter case, however, the Court went out of its way to note that a partial closing motivated by antiunion animus is not protected and that management, under the situation before the Court, would have an incentive to discuss with the union concessions to make the business profitable if

labor costs were an important factor in the failing operation and the closure decision. *Id.*, 682. Moreover, the Court found the need for mandatory bargaining under the circumstances outweighed by management's need for speed, flexibility and secrecy – elements not present in the case at bar.

Id., 682-83.

Guided by the reasoning in the above decisions, even though they arose under the National Labor Relations Act, 29 U.S.C. §§151 *et seq.*, the Court has held that the decision of a railroad to sell its entire business and cease to be a railroad employer "is not a change in the conditions of employment forbidden by the status quo provision of §156," and while the carrier must bargain on the effects of the sale, it was not obligated to serve a Section 6 notice upon the unions in connection with the sale or required to delay closing the transaction. *Pittsburgh & Lake Erie R.R. Co. v. Railway Labor Executives' Ass'n*, 491 U.S. 490 (1989).

Relying upon the language set forth in the *Pittsburgh & Lake Erie Railroad* Case, both the Seventh and Eighth Circuits have found that a carrier has management prerogative to engage in a sale of a part of its railroad. *Chicago & North Western Ry. Co. v. Railway Labor Executives' Ass'n*, 908 F.2d 144 (7th Cir. 1990), *cert. denied*, 112 L. Ed. 2d 1179 (1991); *Railway Labor Executives' Ass'n v. Chicago & North Western Transportation Co.*, 890 F.2d 1024 (8th Cir. 1989), *cert. denied*, 111 L. Ed. 2d 748 (1990).

However, those decisions do not reach the issue as set by the circumstances in this case. Here, the N&W is not going out of business. Its actions establish that there

is no need for it to act quickly. Its conduct took place after a concessionary agreement satisfactory to it was reached, but was refused to be placed in writing, and negotiations were still ongoing and in mediation. And the scheme it takes to accomplish its purposes unquestionably evinces an antiunion animus. Accordingly, the limitations expressed in *First National Maintenance Corp. v. NLRB, supra,* 452 U.S. at 686 n.22, 687, would appear to be applicable.

Moreover, the decision below would be contrary to this Court's ruling in *Fibreboard Paper Products Corp. v. NLRB,* 377 U.S. 703 (1964), which held that contracting out maintenance work being done by its employees was a subject of mandatory bargaining under the National Labor Relations Act. Under the view expressed by the Court in that case, requiring the employer to bargain on this subject would not infringe significantly upon its freedom to manage the business. *Id.*, 213. As there, the reduction of labor costs is "peculiarly suitable for resolution within the collective bargaining framework." *Id.* at 214.

Similar considerations would appear to have governed this Court's decisions in *Order of Railroad Telegraphers v. Chicago & North Western R.R. Co.,* 362 U.S. 330 (1960), and in *Detroit & Toledo Shore Line R.R. Co. v. United Transportation Union,* 396 U.S. 142 (1969). In the former, the Court held that the railroad's plan to abandon certain single-agent stations and to abrogate jobs was a bargainable issue. The Court rejected the contention that the dispute was a minor one, because it involved a major change "affecting jobs." *Id.*, 341. The railroad was

required to maintain the status quo during the time the dispute was in mediation.

In the latter case, *Detroit & Toledo Shore Line R.R. Co. v. United Transportation Union*, the Court held that a change in the on and off-duty points for yard crews was a major dispute over which the carrier had to bargain. Section 2 First of the RLA, 45 U.S.C. §152 First, imposes the duty to make and maintain agreements and to exert every reasonable effort to settle all disputes. This duty, as the Court observed in the *Shore Line* Case, must be read in conjunction with the status quo concept, which is "central" to the Act's design. *Id.* at 150-51. It is this status quo obligation that makes the RLA unique and this requirement, which is central to the design of the RLA, has as its "immediate effect . . . to prevent the union from striking and management from doing anything that would justify a strike." *Id.*, 150.

Under like circumstances to the instant case, the Seventh Circuit in *Burlington Northern R.R. Co. v. United Transportation Union*, 862 F.2d 1266 (7th Cir. 1988), held a trackage rights agreement between a parent and its wholly-owned subsidiary was not made at arm's length and was in fact a device for altering the crew manning provisions for its trains. *Id.* at 1273-74. Thus, that court held the dispute was subject to Section 6 and the status quo provisions of the RLA were applicable.

The latter group of cases appear to rely heavily upon three factors: The employers were not going out of business; the employers were seeking to bypass or reduce the effectiveness of the employee representative; and the preservation and stability of the collective bargaining

relationship would be fostered by maintaining the status quo and requiring the parties to bargain.

The trial court, viewing the dispute in that light, held the dispute was one between the respondents and the petitioner and was a major dispute. N&W was considered as trying to eliminate the Union. Since N&W changed the ground rules in the midst of the mediation conducted by the National Mediation Board, the district court held that the status quo provisions of the RLA were applicable. The Court of Appeals, however, found that the railroad respondents and Lower Lake could not have acted together to violate the statutory commands of the RLA. The court below then proceeded to find that in no event could the dispute have been a major one in light of *Pittsburgh & Lake Erie, supra.*

Accordingly, this case would serve as an appropriate vehicle in which the Court could decide the extent that managerial prerogative adheres to rail carriers under the RLA. In doing so, the Court could provide some guidance to labor and management in the rail industry as to what serves as a major dispute as to which both parties alike, carriers and employee representatives, must bargain and maintain the status quo during the bargaining process required by the Act.

II. THE REVERSAL OF THE GRANT OF THE PRELIMINARY INJUNCTION BY FAILING TO GIVE DEFERENCE TO THE TRIAL COURT'S FINDINGS CONFLICTS WITH THE DECISIONS OF THIS COURT AND VARIOUS COURTS OF APPEALS.

A.

The issuance of a preliminary injunction normally lies in the discretion of the trial judge. The trial court's

determination should be reversed only when the "discretion was improvidently exercised." *See Synanon Foundation, Inc. v. California*, 444 U.S. 1307 (1979).

The test was stated somewhat differently by the District of Columbia Circuit in *A Quaker Action Group v. Hickel*, 421 F.2d 1111, at 1115 (D.C. Cir. 1969), where it said the scope of review is limited "to the issues of whether the trial judge abused his discretion in granting the injunction, or rested his analysis upon an erroneous premise." In *Zepeda v. United States Immigration & Naturalization Service*, 753 F.2d 719 (9th Cir. 1985), the Eighth Circuit held that an appellate court should not reverse a grant of a preliminary injunction because it would have decided differently. That court identified three ways in which a lower court would abuse its discretion: (1) by applying the incorrect preliminary injunction standard or substantive law; (2) by resting a preliminary injunction on clearly erroneous findings of fact; or (3) by applying the correct preliminary injunction standard in a manner that results in an abuse of discretion. *Id.*, 724.

Here, the Court of Appeals reversed on the basis that the trial judge had made clearly erroneous findings of fact and, having erroneously found that the respondent railroads were joint employers or alter egos, that the standard for a preliminary injunction had not thereby been met.

In *Anderson v. City of Bessemer City, North Carolina*, 470 U.S. 564 (1985), however, this Court reassessed the application of the "clearly erroneous" standard of review pursuant to Federal Rule of Civil Procedure 52(a). Fully apropos to the ruling below, this Court said:

> "In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues de novo." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969). If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous. *United States v. Yellow Cab Co.*, 338 U.S. 338, 342 (1949); *see also Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844 (1982).

Id., 573-74.

Under the stated test, numerous courts of appeals have stated that appellate courts must indulge the presumption that the findings are correct and that it is not the function of the reviewing court to reevaluate evidence presented in the trial court. *See, e.g., St. Louis Typographical Union No. 8 v. Herald Co.*, 402 F.2d 553 (8th Cir. 1968); *Gibbs v. Norfolk Southern Ry. Co.*, 474 F.2d 1341 (4th Cir. 1973).

Though the court below described its rulings in terms of clearly erroneous findings, its analysis depended entirely on its uncomfortability with the final result reached by the district court. It, therefore, "under[took] to duplicate the role of the lower court." *Anderson v. City of Bessemer City, supra*, 470 U.S. at 573. In doing so, "the reviewing court over step[ped] the bounds of its duty under Rule 52(a)." *Id.* Where as here, there had been an evidentiary hearing with credibility determinations,

"Rule 52(a) demands even greater deference to the trial court's findings." *Id.*, 525; *see also Inwood Laboratories v. Ives Laboratories*, 456 U.S. 844, 855 (1982).

Here, the Court of Appeals refused to apply the rule of deference. That failure not only was contrary to the standard for reversal of a grant of preliminary injunction, but contravened the underlying principles of the Railway Labor Act – to maintain stability of labor-management relationships as found by the National Mediation Board under Section 2, Ninth, 45 U.S.C. §152, Ninth, and thereby avoid any interruption to commerce or the operation of any carrier engaged therein. Unlike the ambivalence of the National Labor Relations Act, 29 U.S.C. §§151 *et seq.*, the Railway Labor Act has as its major purpose – unionization of railroad employees and the institutionalization of the collective bargaining agreements between a carrier or carriers and the representative or representatives of their employees. *Virginian Ry. Co. System Federation No. 40*, 300 U.S. 515 (1937) ("no answer, as petitioner suggests, that it could close its back shops and turn over the repair work to independent contractors," *id*, 557); *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192 (1944) (through enactment of the Railway Labor Act, Congress encouraged unionization and "has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body. . . . ," *id*, 202).

The decision here has the exact opposite effect. If carriers may join together in this fashion to evade collective bargaining obligations and to rid themselves of the employee representative without first reaching an impasse and then allowing each to exercise the right of

self-help, collective bargaining as intended will be eliminated, and employees will be unable to effectively exercise their right of association, all of which will lead to instability in collective bargaining relationships and must ultimately affect the public by interruptions to the orderly operations of the railroads.

B.

In part, the Court of Appeals' decision emanated from its conclusion that the NS railroad defendants were not joint employers with Lower Lake as a matter of fact, because "the court below did not tailor its findings to [the] four factors" set forth by the Sixth Circuit in *Metropolitan Detroit Bricklayers District Council v. J. E. Hoetzer & Co.*, 672 F.2d 580 (6th Cir. 1982), in analyzing whether several companies are joint employers. (App. A, 6a). In the lead case defining the "single employer" or "joint employer" concept, *Parklane Hosiery Co., Inc.*, 203 NLRB 597, 612 (1973), the National Labor Relations Board described the principal factors as: "(1) some functional interrelation of operations, (2) centralized control of labor relations, (3) common management, and (4) common ownership or financial control."

In *Boire v. Greyhound Corp.*, 376 U.S. 473, 481 (1964), this Court held that determination of that status is essentially a factual one. None of the four principal factors has been held to be controlling. *See, e.g., Pulitzer Publishing Co. v. NLRB*, 618 F.2d 1275 (8th Cir. 1979). In fact, the NLRB stated in *Parklane Hosiery Co., supra*, 203 NLRB at 612: "While none of these factors, separately viewed, have been held controlling, stress has normally been laid

upon the first three factors which reveal functional integration with particular reference to whether there is centralized control of labor relations."

This case, therefore, provides the Court with an opportunity to determine whether the joint employer or alter ego doctrine applies to employees whose labor relations are governed by the RLA and whether the doctrine may be applied to two carriers jointly exercising control of labor relations where they are not under common ownership or control. These are important questions of federal law which have not been decided and should be settled by this Court.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

HAROLD A. ROSS
(Counsel of Record)
ROSS & KRAUSHAAR CO., L.P.A.
1548 Standard Building
1370 Ontario Street
Cleveland, Ohio 44113
(216) 861-1313

Attorney for Petitioner

APPENDIX A

RECOMMENDED FOR FULL TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

Nos. 90-3015/3031

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, LOCAL UNION NO. 1937, *Plaintiff-Appellee,*	)	
v.	)	ON APPEAL from the United States District Court for the Northern District of Ohio
NORFOLK SOUTHERN CORPORATION, NORFOLK & WESTERN RAILWAY COMPANY, and LAMBERT'S POINT DOCK COMPANY, *Defendant-Appellants (90-3015),*	)	
THE LOWER LAKE DOCK COMPANY, *Defendant-Appellant (90-3031).*	)	

Decided and Filed March 12, 1991

Before: RYAN and NORRIS, Circuit Judges; WILHOIT, District Judge.*

---

* The Honorable Henry R. Wilhoit, Jr., United States District Judge for the Eastern District of Kentucky, sitting by designation.

ALAN E. NORRIS, Circuit Judge. Defendants appeal the district court's decision granting a preliminary injunction in favor of plaintiff, International Longshoremen's Association (the "union"). The court's order required defendants to maintain the status quo while complying with the dispute resolution processes of the Railway Labor Act. The railroad defendants, Norfolk Southern Corporation ("Norfolk Southern") and Norfolk & Western Railway Company ("N&W"), contend that, since they were not parties to the collective bargaining agreement between the union and defendant Lower Lake Dock Company ("Lower Lake"), they cannot be required to carry out obligations under the Act. The other defendants contend that there was no basis for preliminary injunctive relief.

BACKGROUND

N&W, a subsidiary of Norfolk Southern, owns coal dock facilities in Sandusky, Ohio. Pursuant to a written agreement with N&W, Lower Lake operated the coal dock as an independent management contractor and was responsible for transferring coal from N&W's railroad cars to ships. N&W compensated Lower Lake on a "cost-plus" basis, paying operating expenses billed by Lower Lake as well as a management fee based upon the amount of coal unloaded. Operating expenses billed to N&W included insurance, utilities, maintenance, wages, benefits and taxes.

When the amount of coal passing through the dock declined significantly during the 1980s, but manpower costs remained constant, N&W asked Lower Lake to

reduce staff and other costs. Since Lower Lake failed to respond to its request, on July 8, 1988, N&W informed Lower Lake that it would terminate the management agreement effective December 31, 1988, and would solicit bids for future operation of the dock. N&W and Lower Lake later agreed to a one-year extension.

Plaintiff union and Lower Lake were parties to a collective bargaining agreement (the "CBA"). On July 21, 1988, the union asked Lower Lake to bargain over the adoption of a successorship clause in the CBA. The last collective bargaining agreement between Lower Lake and the union was dated August 20, 1986, expired June 30, 1988, and contained no successorship clause. A tentative agreement was reached between Lower Lake and the union in 1988, but it was never ratified. In February 1989, the issue was submitted to mediation under the Railway Labor Act (the "RLA"), where it remains.

In 1989, N&W awarded a new management contract to Sandusky Dock Corporation, a subsidiary of Lambert's Point Docks.[1] C.T. Stevedoring, an independent contractor, agreed to furnish the labor force for operation and maintenance of the dock. On September 14, 1989, N&W advised Lower Lake that the management agreement would terminate on December 31, 1989 and, on October 20, Lower Lake notified the union that N&W had terminated the management agreement and that it did not

---

[1] Lambert's Point Docks is a wholly owned subsidiary of Virginia Holding Corporation, which is a wholly owned subsidiary of Norfolk Southern Properties, Inc., which in turn is a wholly owned subsidiary of Norfolk Southern.

know N&W's intentions regarding future employment of Lower Lake's hourly employees.

In response, the union notified Lower Lake of its claim that the CBA required payment of separation allowances to its members, and that the union was requesting a successors and assigns clause. According to the complaint, N&W and Lambert's Point gave the union reason to believe that its members would continue to be employed on the dock. The union sought from Lower Lake an agreement to obtain a commitment from Norfolk Southern and its subsidiaries to hire its members and assume the labor contract. On November 16, 1989, Lower Lake and the union conducted "effects bargaining" (*i.e*, over effects of termination), and reached an agreement on all issues except separation allowances, which was sent to arbitration.

On December 15, 1989, N&W sent a letter to Lower Lake advising it that the dock would be operated by C.T. Stevedoring, and that union members should submit applications for employment with that company. This notice included information for union members interested in employment. On December 19, the union filed suit in the district court claiming that there was a failure to give notice and bargain over conditions of employment resulting from termination of the management agreement. The union alleges that defendants evaded their responsibilities under the RLA. As to the railroad defendants only, the union asserts a claim of breach of contract and seeks compensatory damages. The union characterizes its cause of action as a claim that N&W and Lower Lake, "acting jointly or as one" over a period of years,

failed to bargain in good faith as required by the RLA, particularly 45 U.S.C. §§ 152 and 156.

The district court determined that the dispute came within the purview of the RLA because Lower Lake and Lambert's Point were alter egos of the N&W. By using the "alter ego" language, the court apparently meant that the union's members were de facto employees of N&W and were, therefore, entitled to use the procedures of the RLA in dealing with N&W. The court concluded that the parties were engaged in a major dispute and invoked the procedures found in 45 U.S.C. §§ 155 and 156, including requirements to bargain and maintain the status quo; the court then issued the preliminary injunction to assure compliance with the RLA. Maintaining the status quo, of course, meant that the change of dock management could not be completed and the CBA remained in force.[2]

DISCUSSION

The union asserts that defendants, acting jointly or as one, violated the Railway Labor Act when they failed to give notice to, and bargain with, the union regarding the decision to transfer the dock work to Lambert's Point. However, the RLA's duty to bargain extends only to a carrier and its own employees. *See, e.g.*, 45 U.S.C. §§ 151, Fifth; 151a(4) and (5); and 152, First and Second. Therefore, a necessary predicate to the district court's order is its finding that N&W was an employer of plaintiff's

---

[2] For a description of the RLA's procedures applicable to major disputes, *see Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 378 (1969).

members and should be treated as though it were a party to the CBA.

Courts generally use the "alter ego" doctrine in situations where a change in corporate or business entities threatens to evade collective bargaining obligations. *See, e.g., NLRB v. Allcoast Transfer, Inc.*, 780 F.2d 576 (6th Cir. 1986); *Alkire v. NLRB*, 716 F.2d 1014 (4th Cir. 1983). This doctrine might be relevant were we considering the relationship of Norfolk Southern, N&W and Lambert's Point; it is not, however, relevant to the relationship between those entities and Lower Lake because this latter relationship did not involve commonality of ownership and management. The union contends that N&W and Lower Lake were "joint employers" because they conducted their business in such a way as to be treated as one for purposes of labor law. The railroad, on the other hand, contends that the joint employer doctrine does not apply to the RLA. We need not address that question, since it is clear that there are insufficient facts to support the trial court's finding of alter ego or joint employer status.

Whether a contractor possesses sufficient control over the work of employees to qualify as a joint employer is essentially a factual issue. *Boire v. Greyhound Corp.*, 376 U.S. 473 (1964). "There are four factors which must be analyzed in determining whether two companies are joint employers: the interrelation of operations between the companies, common management, centralized control of labor relations, and common ownership." *Metropolitan Detroit Bricklayers Dist. Council v. J.E. Hoetger & Co.*, 672 F.2d 580, 584 (6th Cir. 1982). In the present case, the court below did not tailor its findings to these four factors but,

instead, listed only the following general findings to support its conclusion that N&W was an employer:

> Norfolk & Western owns the facility, pays a management fee to Lower Lake Dock, pays all the operating costs, was fully advised as to labor negotiations of Lower Lake Dock, conducted time studies, made recommendations as to reduction in employee numbers, had input on manning schedules and on overtime and holiday pay. . . .

These facts do not support a determination that N&W and Lower Lake were joint employers, nor do they indicate that operations of the two companies were substantially interrelated beyond the extent necessary to the performance of their basic contractual duties. *See International House v. NLRB*, 676 F.2d 906, 915 (2d Cir. 1982). Considering the "cost-plus" basis of payment required by the management agreement, the evidence recited by the district court is merely consistent with conduct to be expected of a party interested in holding down costs. *Id.* at 914. A cost-plus contract, by itself, does not establish a joint employer relationship.

It is undisputed that Lower Lake and N&W had neither common management nor common ownership. In addition, the evidence indicates that the management agreement was the product of arm's-length dealings; indeed, N&W's inability to wrest cost savings from Lower Lake is what led to termination of the relationship between the two companies. There was little, if any, evidence that the two companies integrated their operations, or that N&W was involved in the day-to-day operation of the dock. By the terms of the management agreement, Lower Lake was to "furnish all labor and supervisory

forces of every kind." The agreement further provided that:

> [I]t is expressly understood and agreed that the Contractor [Lower Lake] shall be and remain an original, private and independent contractor hereunder and shall employ, pay from its own funds and discharge all persons engaged in the performance of such work, and all such persons shall be and remain the sole employees of the Contractor and subject to its exclusive authority, supervision, direction and control.
>
> . . . The Railway [N&W] . . . shall play no part whatever in the transfer or storage operation which shall be conducted solely by the Contractor, nor shall the Railway exercise any control whatever over the employees engaged in the transfer or storage operation.

While this contract language is not controlling, it is persuasive evidence of the parties' intentions and of their understanding of their contractual arrangement.

As for labor relations, the district court stated only that the N&W was "fully advised," "made recommendations," and "had input." There was no finding that N&W controlled labor relations. The record also indicates that Lower Lake had the sole responsibility to negotiate collective bargaining agreements with the members of the union. N&W may have wanted Lower Lake to limit labor rates and fringe benefits, but this desire does not indicate any sort of joint control, since it is merely a product of the "cost-plus" nature of the management agreement. Finally, there was no finding by the district court that N&W had immediate supervision or control of the employees. Based upon this record, the district court's finding of "alter ego"

or joint employer status between Lower Lake and the railroad defendants is clearly erroneous.

There are four factors that are particularly important in determining whether a preliminary injunction is proper: (1) the likelihood of the plaintiff's success on the merits; (2) whether the injunction will save the plaintiff from irreparable injury; (3) whether the injunction would harm others; and (4) whether the public interest would be served. *In re DeLorean Motor Co.*, 755 F.2d 1223, 1228 (6th Cir. 1985). A district court is required to make specific findings concerning each of the four factors, unless fewer are dispositive of the issue. *Id.* Here, the court, as discussed above, was primarily concerned with the first factor and, after concluding that N&W and Lower Lake were joint employers, summarized its view of the four factors as follows:

> Coming now to the other factors to be considered, the preliminary injunction will save the union members from irreparable harm. It will certainly not harm others, and the public interest will be served. It is true that plaintiff's members may recoup their economic loss, but the irreparable harm is in the potential defeat of the remedial procedures of the Railway Labor Act and the potential interruption of interstate commerce. (Citation omitted.)

However, since we have determined that the court's decision on joint employer status was clearly erroneous, there can be no likelihood of success against the railroad defendants, and plaintiff has not suffered the irreparable harm referred to by the district court.

Since we conclude that the railroad defendants are not employers of the union's members and, therefore, not

subject to the injunctive relief sought by the union, and that N&W has a contractual right to terminate Lower Lake's management of the dock, whether the union retains an interest in requiring Lower Lake to maintain the CBA and comply with the dispute resolution procedures of the RLA is uncertain. In addition, the effect of the Supreme Court's opinion in *Pittsburgh & Lake Erie R.R. Co. v. Railway Labor Executives Ass'n*, 491 U.S. 490 Ct. 2584 (1989), upon the union's prerogatives under the RLA needs to be re-evaluated. We are not aware of any basis remaining upon which Lambert's Point is subject to injunctive relief.

The Order of Preliminary Injunction is **reversed**, and this cause is **remanded** to the district court.

APPENDIX B

Transcript of December 29, 1989 Hearing

* * *

[p. 224] THE COURT: All right. These will be my findings of fact and conclusions of law. I wish the Court would have more time, but the Court has not had that luxury.

The Court finds, as follows: That the Norfolk and Western Railroad owns all of the facilities involved in this. It pays all the management fees – pays all the operating expenses. It was kept advised of all labor and negotiations.

It is the opinion of the Court there would have been no acceptable collective bargaining agreement, without the approval of the Railroad. The Railroad urged the reduction in force and that was trying to be implemented by the Lower Dock, or the Lower Lake Dock Company.

The Railroad certainly had some input in the work rules. Also, it had some input in the management schedules. Certainly had some influence in the overtime, the holiday pay. But finally, Lambert's Point, which is a subsidiary of this same railroad, is now incorporated, a corporation called Sandusky Docks, and hired all of the supervisors, except one who has another job, of the Lower Lake Dock.

[p. 225] The Court would find that the supervisory right in the collective bargaining is a bad failth [sic] element; and further, the Court finds that Lower Lake Dock, Lambert's Point Docks, are just alter egos of the Norfolk and Western.

For this reason the Court will sign and have filed today the order of preliminary injunction. I am sure you have a right of appeal, immediate appeal, on that, and no doubt one will be taken.

In the meantime I would urge the parties to try to resolve these matters. I understand and I appreciate the position of Lower Lake Dock, that you have done everything you can to handle the effects of part of this, but this will be the order of the Court.

MR. RYDZEL: Can I inquire how we'll be paid for entering our services?

THE COURT: You may inquire somewhere along the line, but not tonight. Thank you very much. Hope you have a good holiday.

(End of Hearing at 7 P.M.)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, LOCAL UNION NO. 1937, Plaintiff,	)	CIVIL ACTION NO. 3:89CV7699
vs.	)	
THE LOWER LAKE DOCK COMPANY, NORFOLK SOUTHERN CORPORATION, NORFOLK & WESTERN RAILWAY COMPANY, and LAMBERT'S POINT DOCK COMPANY, Defendants.	)	

ORDER OF PRELIMINARY INJUNCTION
(Filed Dec. 28, 1980)

This cause heard on the motion by plaintiff International Longshoremen's Association, AFL-CIO, Local Union No. 1937 ("ILA"), for a preliminary injunction, and notice having been given to all concerned parties pursuant to Rules 4(c) and 65 of the Federal Rules of Civil Procedure, and defendants having submitted papers in opposition thereto,

IT IS HEREBY ORDERED, that, pursuant to Rule 65 of the Federal Rules of Civil Procedure, effective during the pendency of this action, defendants, The Lower Lake Dock Company ("Lower Lake"), Norfolk and Western Railway Company ("N&W"), Lambert's Point Dock Company ("Lambert's Point"), and Norfolk Southern Company ("NS"), their officers, agents, representatives, successors, and all those acting in concert or in participation with them who receive actual notice of this Order, be

and they hereby are enjoined from calling, threatening, permitting, instigating, directing, supporting, defending, authorizing, encouraging, participating in, approving, assisting or continuing to engage in refusals to comply with the notice, negotiation and mediation provisions of the Railway Labor Act and to make and maintain the agreements with plaintiff ILA unless and until the requirements of the Railway Labor Act have been exhausted, and further enjoined from refusing to recognize plaintiff ILA as the representative of the employees working at defendant Norfolk and Western Railway's Sandusky Dock and to meet and bargain with plaintiff on its pending Section 6 Notices.

AND IT IS FURTHER ORDERED, that the defendants, their officers, agents, representatives, successor, and all those acting in concert or participation with them shall maintain the status quo, and comply with and fulfill the dispute resolution processes of the Railway Labor Act prior to transferring the operations at Sandusky Dock from defendant Lower Lake Dock Company to defendant Lambert's Point Dock Company and before Lambert's Point Dock Company employs any person other than members of plaintiff to perform the operations at the Sandusky Dock.

IT IS FURTHER ORDERED, that defendants shall communicate the dictates of this Order to their representatives, agents, employees and members and shall take all affirmative steps to comply with the notice, negotiation and mediation provisions of the Railway Labor Act and to prevent disruption of normal operations and employment at defendant Norfolk and Western Railway's Sandusky Dock.

AND IT IS FURTHER ORDERED, that this Preliminary Injunction Order is issued without condition of bond, there being allegations that defendants have violated the statutory commands of the Railway Labor Act and a reasonable likelihood upon trial that defendants may establish such violations.

DATED: 12/29, 1989

/s/ John W. Potter
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

(Filed Jan. 2, 1990)

International Longshoremen's Association, AFL-CIO, Local Union No. 1937,

Plaintiff

vs.

The Lower Lake Dock Company, et al.,

Defendants

Case No. 3:89CV7699

MEMORANDUM AND ORDER

POTTER, J.:

On December 29, 1989, this Court conducted an eight hour hearing on plaintiff's motion for a preliminary injunction to enjoin defendants from violating the Railway Labor Act, 45 U.S.C. §151 et seq. Because of the necessity to rule prior to the actions contemplated to be taken by the defendants on January 1, 1990 and because of the lateness of the hour, the Court made its findings of fact and conclusions of law from the bench and granted plaintiff's motion.

It was implicit from the colloquy of the Court with counsel and from the Court's findings of fact and conclusions of law and from its order that the Court considered the criteria for a preliminary injunction set forth in *In re DeLorean Motor Co.*, 755 F.2 1233 (6th Cir. 1985). The Court now supplements its prior findings and conclusions.

The Court notes that the Railway Labor Act was "enacted in 1926 in order to promote the prompt and orderly settlement by agreement or arbitration of labor

controversies between interstate carriers and their employees arising out of disputes concerning rates of pay, rules of work or working conditions." 32 Fed. Proc. L. Ed. §76:137; *Shore Line v. Transportation Union*, 396 U.S. 142 (1969).

DeLorean states that four factors are important in determing [sic] whether a preliminary injunction is proper:

> (1) the likelihood of plaintiff's success on the merits; (2) whether the injunction will save the plaintiff from irreparable injury; (3) whether the injunction would harm others; and (4) whether the public interest would be served by the injunction. *E.g., USACO Coal Co. v. Carbomin Energy, Inc.*, 689 F.2d 94 (6th Cir. 1982); *Friendship Materials, Inc. v. Michigan Brick, Inc.*, 679 F.2d 100 (6th Cir. 1982); *Mason County Medical Association v. Knebel*, 563 F.2d 256 (6th Cir. 1977). Rule 52 requires a district court to make specific findings concerning each of these fourt [sic] facts, unless fewer are dispositive of the issue. *United States v. School District of Ferndale*, 577 F.2d 1339, 1352 (6th Cir. 1978).

The four factors are to be balanced and are not prerequisites that must be met.

The Court now elaborates on its oral findings as to the likelihood of success on the merits. As noted above, the Railway Labor Act has a special purpose and has special remedial procedures to resolve disputes. It favors retaining the status quo until the rights of the parties can be fairly and fully investigated. See *DeLorean* (citing with approval *American Federation of Musicians v. Stein*, 213 F.2d 679 (6th Cir.), *cert. denied*, 348 U.S. 873 (1954), 75 S. Ct. 108, 99 L.Ed. 687 (1954)), and *Blount v. Societe Anonyme*

Du Filtre Chamberland Systeme Pasteur, et al., 53 F. 98, 101 (6th Cir. 1892)

On December 29, 1989 the Court found on the evidence presented that The Lower Lake Dock Company and Lambert's Point Dock company were alter egos of the Norfolk & Western Railway Company. As stated by the Court orally, Norfolk & Western owns the facility, pays a management fee to Lower Lake Dock, pays all the operating costs, was fully advised as to labor negotiations of Lower Lake Dock, conducted time studies, made recommendations as to reduction in employee numbers, had input on manning schedules and on overtime and holiday pay. Lambert's Point dock proposed to hire all of Lower Lake Dock's supervisory personnel. Only the members of plaintiff's union were effectively terminated.

Norfolk & Western's contractual relationship permitted it to unilaterally terminate its agreement with Lower Lake dock at the end of any year. It gave notice in 1988 and now in 1989. From the evidence submitted, such an arrangement can circumvent collective bargaining between the Union and Lower Lake Dock contrary to the principles of the Railway Labor Act. In fact, notice was given in July of 1988 because Norfolk & Western was "greatly disappointed by the adverse awards by Public Law Board No. 4327 Longshoremen's claims 1 and 2." Def. Exh. LL-2. The Court, on the evidence submitted, finds this to be a major dispute. Cf. *Butte, Anaconda & P. Ry. Co. v. Brotherhood of Locomotive Firemen & Enginemen*, 268 F.2d 54 (9th Cir.) *cert. denied*, 361 U.S. 684 (1959); *St. Louis Southwestern Ry. v. Brotherhood of Railroad Signalmen*, 665 F.2d 987 (10th Cir. 1981) *cert. denied*, 456 U.S. 945

(1982); *Burlington Northern R. R. Co. v. United Transportation Union*, 862 F.2d 1266 (7th Cir. 1988). The Court finds that the finding in *Pittsburgh & Lake Erie R.R. Co. v. Railway Labor Executives' Ass'n*, 109 S. Ct. 2584 (1989), is not controlling in the case sub judice. Norfolk & Western is not, on the facts submitted, selling its facility but avoiding the necessity of union negotiations. On the evidence submitted, the Court finds a substantial likelihood of success on ther [sic] merits.

Coming now to the other factors to be considered, the preliminary injunction will save the union members from irreparable harm. It will certainly not harm others, and the public interest will be served. It is true that plaintiff's members may recoup their economic loss, but the irreparable harm is in the potential defeat of the remedial procedures of the Railway Labor Act and the potential interruption of interstate commerce. *Shore Line*, 396 U.S. 142.

The Court also considered the necessity of a bond. Plaintiff's counsel in closing argument analogized this action to the private attorney general doctrine. The Court finds that this action involves a matter of public interest, and the requirement of giving a bond would discourage the initiation of the suit, thus permitting possible circumvention of the Act. 7-Pt.2 J. Moore, J. Lucas & K. Sinclair, Jr., Moore's Federal Practice ¶ 65.09 (2d ed. 1987).

THEREFORE, for the foregoing reasons, and those expressed on December 29, 1989, it is

ORDERED that plaintiff's motion for a preliminary injunction is well taken.

/s/ John W. Potter
United States District Judge

APPENDIX C

No. 90-3015/3031

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

INTERNATIONAL LONGSHOREMEN'S ASSOC., AFL-CIO, LOCAL UNION NO. 1937,	)	
Plaintiff-Appellee,	)	
v.	)	ORDER
THE LOWER LAKE DOCK COMPANY,	)	(Filed April 24, 1991)
Defendant (90-3015), Defendant-Appellant (90-3031)	)	
NORFOLK SOUTHERN CORPORATION, ET AL.,	)	
Defendants-Appellants (90-3015), Defendants (90-3031)	)	

BEFORE: RYAN and NORRIS, Circuit Judges; and WILHOIT*, United States District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

---

*Hon. Henry R. Wilhoit, Jr. sitting by designation from the Eastern District of Kentucky

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

APPENDIX D

Excerpts from the Railway Labor Act.

Railway Labor Act (44 Stat. 577, as amended, 45 U.S.C. § 151 et seq.)

GENERAL PURPOSES

SECTION 2. The purposes of the act are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

GENERAL DUTIES

First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of

any dispute between the carrier and the employees thereof.

Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

* * *

Seventh. No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in Section 6 of the Act.

* * *

Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter. In such an

investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

* * *

SECTION 6. Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or

working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by Section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.